Patterson v. *Gaines*, 6 How. U. S. 550. It was even alleged in *Queen* v. *Millis*, that a marriage *per verba de præsenti* was not proved, as, according to that case, to constitute such a marriage in England or Ireland, the presence of a person in Holy Orders had always been deemed necessary. But this was admitted to be a requirement under some local Saxon canons, of King Edmund (A. D. 940). How any Saxon canons enacted one hundred and twenty-six years before the Norman Conquest of England, could affect Ireland, then not under the dominion of England, remained unexplained in the judgment. Such local canons, however, could have no effect upon the general law of Christendom. Such Saxon canons were truly only the king's ecclesiastical law, binding on his subjects alone. See observations of Lord LYNDHURST, Chancellor, *In re Millis*, also of Chief Justice TINDAL, in same case.

The sole question now before us is, Is the law of domicile to take precedence of the law of the place of contract? If so, and the presence of a priest not being required by the *lex domicilii*, nor yet by the ancient canon or common law *cadet quæstio* of the English local requirement in that respect. We have seen that the *lex domicilii* is preferred not only in the case of an absolute prohibition *domicilii*, but even in a qualified one, at least such must be assumed unless the decision of the Court of Appeal in *Sottomayor* v. *De Barros*, should be overruled, and the views indicated in the foregoing opinion of Sir JAMES HANNEN be finally adopted. If such be so in *annulling* a marriage, upon the ground that it is forbidden by the *lex domicilii*, does the converse hold good, that the *lex domicilii* should prevail in *affirming* a marriage not celebrated in accordance with the *lex loci contractus*? We think it is even an *a fortiori* case, the man's domicile governing the case, the wife invariably taking the domicile of the husband.

Many of the difficulties which have arisen, in construing a contract of marriage may, perhaps, be traceable to a disregard of the two-fold character of this institution. Marriage is not merely a contract, but a *status* likewise. Sir JAMES HANNEN says in delivering his opinion, *supra:* "In truth, very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is, indeed, based upon the contract of the parties, but it is a *status* arising out of a contract to which each country is entitled to attach its own conditions, both as to creation and duration." In the case we have been submitting the contract may well have taken place in one country, where at all events such a contract is not prohibited, and the *status* arising out of such contract, with all its incidents, be subjected to the conditions which each country may respectively attach thereto, even to the extent of withholding recognition by the *locus contractus* through a neglect of its ceremonial requirements, and yet the marriage, *qua* marriage, may not be invalid. HUGH WEIGHTMAN.

New York.

High Court of Justice. Court of Appeal.

DREW *v.* NUNN.

The lunacy of a principal, if so great as to render him incapable of contracting for himself, puts an end to an authority to contract for him, previously given to his agent.

Where a principal holds out an agent as having authority to contract for him, and afterwards becomes lunatic, he is liable on contracts made by the agent after the lunacy, with a person to whom the authority has been so held out, and who had no notice of the lunacy.

THE claim was for a sum of 99*l.* 4*s.* 4*d.*, the price of boots and shoes supplied by the plaintiff to the defendant on the order of the defendant's wife. The defendant, at different times, dealt with the plaintiff on credit. In August 1872, defendant paid by check a bill then owing to the plaintiff for goods supplied on his wife's order. In November 1873, the defendant being in a weak state of health, authorized the agent of his property to pay the whole of the defendant's income to his wife, and he also authorized and allowed her to draw checks at discretion.

In December 1873, the defendant became lunatic, and was placed in a private asylum, where he remained until April 1877. Between April 3d 1876, and June 27th 1877, the defendant's wife ordered the goods from the plaintiff, the price of which was claimed in this action, and the plaintiff supplied the goods to her on credit. The plaintiff was ignorant when the goods were so supplied that the defendant had become lunatic, or that he had given his wife authority to receive his income. The defendant recovered his reason, and the plaintiff brought this action.

In June 1877, the defendant revoked the authority he had given to his wife to draw checks, and he had before that time prohibited his agent from paying any income to her.

On these facts MELLOR, J., refused to leave to the jury the question whether or not, when the goods were supplied, the income received by the wife was sufficient for the maintenance of herself and her family, and directed the jury to find for the plaintiff for the amount claimed.

The Court of Appeal, on the application of counsel for the defendant, made an order *nisi* for a new trial on the ground of misdirection.

Willis, Q. C., now showed cause.—The judge was right in directing the verdict for the plaintiff on the facts. The first question is, was the authority given to Mrs. Nunn to pledge her husband's credit determined by his subsequent lunacy? It is submitted that it was not. Here there was an express authority given to the wife to bind her husband, so that the decision in *Jolly* v. *Rees*, 15 C. B. N. S. 628, has no application. Contracts entered into with an insane person may be enforced against him where no advantage is taken of his incapacity, and where the consideration is whollv or in part executed: *Moulton* v. *Camroux*, 2 Ex. 487,

and in error, 4 Ex. 17; *Baxter* v. *Earl of Portsmouth*, 5 B. & C. 170; *Brown* v. *Goddrell*, 3 C. & P. 30 (see ruling of Lord TENTERDEN); *Dane* v. *Viscountess Kirkwall*, 8 Id. 679, and *Neill* v. *Morley*, 9 Ves. Jun. 478 (see judgment by Sir WILLIAM GRANT at p. 481). In *Stead* v. *Thornton*, note to *Stevens* v. *Badcock*, 3 B. & Ad. 357, the decision turned upon the lunatic having been incompetent to appoint any agent. So also in *Tarbuck* v. *Bispham*, 2 M. & W. 2, PARKE, B., at p. 8, says that a lunatic cannot appoint an agent to state an account. In *Reed* v. *Legard*, 6 Ex. 636, the husband was held liable for goods supplied to his wife during his lunacy, but the goods were necessaries, so that case is not in point. See authorities referred in Story on Agency, sect. 481, also the cases collected in the note to *Manby* v. *Scott*, 2 Smith Lead. Cas., 7th ed. 469, *et seq.*

Horne Payne, for the defendant.—It is submitted that lunacy operates as an absolute revocation of the agent's authority. A lunatic's marriage is void, if, when the ceremony took place, he was so insane as not to understand the nature of the act he was performing: *Browning* v. *Reane*, 2 Phill. Ecc. Cas. 69; see also *Howard* v. *Digby*, 2 Cl. & Fin. 634. The cases of *Stead* v. *Thornton*, reported in note to *Stephens* v. *Badcock*, 3 B. & Ad. 357, and *Tarbuck* v. *Bispham*, 2 M. & W. 2, are distinct authorities to show that a lunatic is incapable of appointing an agent. So, also, in Story on Agency, 7th ed. sec. 6, in dealing with the question as to who may delegate authority to agents, it is said, "Idiots, lunatics and persons not *sui juris* are wholly incapable." With the exception of the above, there are no authorities on the matter. The inconvenience would be extreme if the agent's employment might continue after the lunacy of his principal.

BRETT, L. J.—This appeal has stood over for a very long time, and principally on my account. It has stood over in order to enable me to make every effort to decide the question involved upon some satisfactory principle. But, speaking only for myself, I have found the doctrine applicable, the most difficult and least to be satisfactorily explained doctrine I have ever met with in the English law. The facts are that the defendant when sane, gave to his wife an absolute authority to act for him, and held out to the plaintiff that he had given his wife that authority. I think it must be taken

as a fact, also, that afterwards the defendant became not merely insane, but so insane that he could not have contracted with any one on his own behalf, and so insane that if he had attempted to make a contract with any one, it would have been seen at once by the other person, that he was too insane to do so. Under these circumstances, the wife ordered the goods from the plaintiff, who had no knowledge of the lunacy, and was supplied with them by him. The husband was confined for a time in a lunatic asylum, but afterwards recovered his reason. After his recovery the present action is brought against him, and he defends it on the ground that the mandate or authority which he gave to his wife, was put an end to by his subsequent insanity, and therefore, that he is not liable for the price of the goods, and the plaintiff cannot recover it from him. MELLOR, J., left no question to the jury as to the extent or amount of the defendant's insanity, but directed them that the plaintiff was entitled to recover. It must be taken, therefore, I think, that insanity existed to the extent I have stated. Two questions arise on these facts: First, does the insanity of the principal put an end to the mandate or authority given to the agent? *i. e.*, does it cause that mandate or authority to cease? One would have thought that question would have been found to have been decided on clear principles. But when authorities are looked into—and I have looked into Story on Agency, the Scottish and French authorities, Pothier and others—no satisfactory conclusion can be arrived at. If it is held that such insanity as existed here, did not put an end to the agent's authority, then clearly the plaintiff is entitled to recover upon that ground.

But, in my opinion, such insanity does put an end to the agent's authority. It is admitted that there are certain changes of *status* which do put an end to it. For instance, if a woman be the principal who appoints an agent, and she marries, her marriage puts an end to the authority previously given to that agent. The bankruptcy of a principal puts an end to it. His death puts an end to it. The reason why the authority is then put an end to, is stated to be because the person who otherwise would be liable has become a different person from the giver of the authority. In marriage, the husband; in bankruptcy, the assignee; in death, the heir or executor, would be substituted for the person who gave the authority. If the change of the person who gave the authority were the real ground upon which we had to proceed, then the lunacy of the

principal would not put an end to the authority until that lunacy was established by a commission having been held, so that the committee would be liable instead of the lunatic. But I do not think that is a satisfactory principle upon which to base the rule. In bankruptcy, the assignee, although he is a different person, is bound to carry out some contracts made by the bankrupt. In the case of death, the executors are the representatives of the dead person for many purposes. I, therefore, think the true ground is that the agent, being a person appointed when the principal could act for himself to act for him, when the principal, according to law, cannot act for himself, the person who represents him ceases to be able to act for him. If that is so, where there is lunacy like that in the present case—lunacy so great that the person who suffers from it has no contracting mind, and cannot contract or do any legal act for himself for want of mind—then, as the principal at law is incapable of doing the act for himself, his agent cannot do it for him. Such lunacy, therefore, puts an end to the authority of the agent, and if any agent acts for his principal after such lunacy is brought to his knowledge, that agent would be doing a wrongful act both to the principal and the person with whom he dealt, and he would be liable to any person with whom he so acted for the principal.

If, therefore, this lady, the defendant's wife, who must be taken to have known of her husband's lunacy, had acted with anybody to whom her previous authority had not been held out, I should say she would be acting as her husband's agent wrongfully, although, being a married woman, it would be difficult to make her liable. I should say the contract would be void as against the supposed principal, and the agent in such a case would himself be liable for misleading an innocent person. But then comes the question, who is liable where the authority of the agent has been held out to a person dealt with who had no notice of the principal's lunacy? An agent may be held out as having authority in one of two ways. Where some instrument, such as a power of attorney, asserts that he has the authority, then the fact of the power of attorney having been previously given, is an assertion that the person holding it may act for the principal, and if the agent is acted with within that authority the principal is bound. The other way in which an agent may be held out as having authority, is where something has been done, as in the present case, where the principal, whilst sane, has

held out that his agent had authority to act for him in particular cases, and then the principal having become insane, and the agent knowing of the lunacy, nevertheless acts with a third person as though the authority continued. What is the consequence? It seems to me that a person who deals with the agent without knowledge of the principal's lunacy, has a right so to deal, and that the lunatic is bound by having held out the authority of the agent. It is difficult to state what are the grounds upon which this principle rests. It is sometimes said that the right depends on contract. I cannot see it. It is also put on the ground of estoppel. It is somewhat difficult to see how, in strictness, there can be an estoppel. It is also said that the right depends upon representations made by the principal, upon which a person with no notice to the contrary is entitled to act. There is an elaborate note in Story on Agency, by the editors of the seventh edition, in which they say the principle is to be defended on the ground of public policy. It is said by others to be in aid of rendering effectual business transactions. To my mind, the better way of stating the ground is, that it is because of a representation, made by the principal when he was sane and could make it, to an innocent party, upon which the latter has a right to act until he knows of the lunacy. Supposing there is no lunacy, but a principal holds out a person to be his agent, and then, of his own accord, withdraws the agency. As between the principal and the agent, the right to bind the principal has ceased, and then the agent does a wrongful act by acting with a third person as though the authority continued; nevertheless, if the agent has been held out as having authority to the third person, and the latter acts with the agent before he has received any notice of the authority having ceased, the principal is still bound, upon the ground that he made representations upon which the third person had a right to act, and cannot retract from the consequences of those representations. It is true, that if the principal becomes lunatic, he cannot himself give notice to the third person of the agency having ceased, and he may be an innocent sufferer from the wrongful act of the agent. But so is the other, and it is a principle of law, that where it is a question which of two innocent parties shall suffer, that one must suffer who caused the state of things upon which the other has acted. Therefore, in my opinion, although the lunatic recovers his reason, he cannot, after his recovery, any more than if he had never been a lunatic, say that an innocent person who acted on represent-

ations made before lunacy, had not a right to do so. A difficulty, no doubt, arises in stating a general principle applicable to such cases as these; but, for my own part, although it is not necessary to decide the question to-day, I should think that the same rule would apply in the case of the principal's death as of his lunacy; and that if representations made by a person during life, were acted upon after his death by an innocent party, without any knowledge of the death, the principal's executors would be bound.

On these grounds, therefore, although the authority was put an end to by the defendant's lunacy, and the agent had no authority to deal with the plaintiff, I nevertheless think that the plaintiff can recover, because representations were made by the defendant whilst sane to the plaintiff, upon which the plaintiff was entitled to act until he had notice of the lunacy, and no such notice was given to him.

BRAMWELL, L. J.—I am of the same opinion. I desire to add a few words to what has been said by BRETT, L. J., in whose judgment I entirely agree. The defendant in this case must be taken to have told the plaintiff, or represented to him that the defendant's wife was his agent to contract debts with the plaintiff in the way of his trade, and that the plaintiff might continue to deal with her on the responsibility of the defendant. That is the effect of what has been found in this case. It is quite clear when such an authority as this is given, that it continues until it is revoked, and notice of the revocation is given to the person who has been told that he may deal with the agent. That is the general rule, but then it is said, that it does not apply where the revocation is not intentional, but arises by reason of the principal's insanity. Why? It may be a hardship on the person who gives the authority, but it is much harder on the person who acts on that authority without notice of the revocation. Insanity is not a privilege, so as to give the person who suffers from it a benefit at the expense of the other; it is a disability which no doubt ought not to be allowed to affect the insane person more than is necessary. I therefore think that there is no reason why a case like this should be taken out of the general rule to which I have referred, and indeed it would be most alarming if it were. The person who had been told that he was the agent, might continue so to act most innocently—with the utmost *bona fides*; he might not know of the lunacy, or, if he did know, might

think the best thing for the lunatic was to continue the agency; yet, in all these cases, if the argument for the plaintiff was rightly founded, he would be liable to pay over again for the goods to the principal, or to make good any mischief which had happened to the person with whom the agent had acted. With respect to what the reason of the rule is, I do not like to lay it down with much peremptoriness. It seems to me like the case of a guarantee where a person says, "Supply goods to A. B., and I will pay for them until I revoke the authority." It seems to me that the thing is in the nature either of an agreement between the parties, or of a license to the person supplying the goods. The agreement or license continue in force until revocation. Lord Justice BRETT'S judgment, has proceeded on the ground that the defendant was in such a state of insanity, that the insanity itself was a revocation. Now, I am not prepared to say every case of insanity would be sufficient to revoke the authority. I should think the insanity must be something approaching dementia, in order to do so. If the defendant, for instance, had known that his wife was pledging his credit, I do not think that because he was insane he would have ceased to be liable. Where a man has no mind at all, of course he is incapable of contracting; he is like a dead man, he has no contracting intelligence. If that was the case here, I think the judgment of the court below may be well supported on the ground relied on by BRETT, L. J., and should be affirmed.

BRETT, L. J.—COTTON, L. J., agrees with the conclusion to which we have come. He does not wish to pledge himself to any opinion as to whether or not the authority was in fact put an end to in this case, or whether or not it can be put an end to in like cases until there has been a commission of lunacy. As to the holding out of authority he thinks that there is a contract between the person making the representation of authority and the person to whom it is made; that that contract exists until notice of revocation, and that the principal is bound by the acts of the agent until such notice has been given. He wishes his judgment to be put on the ground that in this case the former contract had not been put an end to, and that the defendant is therefore bound. I wish for myself to add, that if there was any question as to the extent of the defendant's insanity, it should have been left to the jury. In argument, however, it was admitted that in fact, the defendant was in such a

state of lunacy that he could not contract himself. Mere weakness of mind would not bring the case within the rule I have laid down.

Order discharged.

Among the various causes or modes of revocation of an agent's authority, the prevailing rule is that it shall not affect third persons until notice, or at least knowledge of the facts which work a revocation is received by the person to be affected thereby.

This is undoubtedly true as to voluntary revocation by the principal, especially where he was negligent in not giving notice thereof: *Morgan* v. *Steel*, 5 Binn. 305 (1812); *Beard* v. *Kirk*, 11 N. H. 397 (1840); *Tier* v. *Lampson*, 35 Vt. 179 (1862); *Diversy* v. *Kellogg*, 44 Ill. 114 (1867); *Jones* v. *Hodgkins*, 61 Me. 480 (1872); *Fellows* v. *Hartford and N. Y. Steamboat Co.*, 38 Conn. 197 (1871).

And the American cases applying the same principle to revocation by the insanity of the principal: *Davis* v. *Lane*, 10 N. H. 156 (1839), much like the case of *Drew* v. *Nunn; Wallis* v. *Manhattan Bank*, 2 Hall 495 (1829).

It is not impossible that a judicial declaration of lunacy, and an appointment of a guardian, or committee, to take charge of the lunatic's estate might, *ipso facto*, work a revocation, since all the estate to be affected would then be out of the principal's hands and control; but this, if so, rests upon somewhat different grounds. See *Wallis* v. *Manhattan Bank, supra; Isler* v. *Baker*, 6 Humph. 85.

For similar reasons a judicial decree of bankruptcy against the principal, may at once work a revocation of any prior agent's power to dispose of his estate, even as against subsequent *bona fide* purchasers; for the bankrupt, after such decree, has no estate to dispose of: *Minett* v. *Forrester*, 4 Taunt. 541 (1811); *Parker* v. *Smith*, 16 East 382 (1812). But see *Ogden* v. *Gillingham*, Baldw. 38 (1829).

The most prominent instance of instantaneous revocation, even without notice, is that of the death of the principal. This, it is now well settled, terminates the agent's authority, and third persons dealing with him afterwards, though in entire ignorance of the principal's death, acquire no rights against his estate (excepting, of course, cases where a power is coupled with an interest). The short argument is, there is no principal, and if no principal there can be no agent, and so no contract. Another view taken is that the death, being a public act, is implied notice to all the world, and so every one is bound to have knowledge of it; but this seems somewhat like a legal fiction. The result, however, is well settled. See *Marlett* v. *Jackman*, 3 Allen 287 (1861), a case of partnership, to be sure; but the same principles are supposed to govern both cases: *Harper* v. *Little*, 2 Greenl. 14 (1822); *Lewis* v. *Kerr*, 17 Iowa 73 (1864); *Turnan* v. *Temple*, 84 Ill. 286 (1876); *Gleason* v. *Dodd*, 4 Met. 333 (1842); *Michigan Insurance Co.* v. *Leavenworth*, 30 Vt. 12 (1856); *Gale* v. *Tappan*, 12 N. H. 145 (1841); *Rigs* v. *Cage*, 2 Humph. 350 (1840); *Watson* v. *King*, 1 Stark. 121 (1815); *Wallace* v. *Cook*, 5 Esp. 118 (1804); *Scruggs* v. *Drivers*, 31 Ala. 274 (1857); *Saltmarsh* v. *Smith*, 32 Id. 404 (1858); *Cleveland* v. *Williams*, 29 Tex. 205 (1867); *Ferris* v. *Irving*, 28 Cal. 645 (1865).

On the other hand, many respectable authorities hold that death, without notice, does not instantly work a revocation, if the act to be done, or contract to be made, can be and is done, in the name of the agent, and *not in the name of the principal*. That a deed of real estate, requiring the principal's name, cannot be executed by an agent, after his principal's death, all agree; but as to many

simple contracts, or acts *in pais*, a different rule has been sometimes asserted. See a very elaborate and valuable case to this point in *Ish* v. *Crane*, 8 Ohio St. 520 (1858); 13 Id. 574 (1862); *Dick* v. *Page*, 17 Mo. 234 (1852); and see 26 Id. 313; *Cassiday* v. *McKenzie*, 4 W. & S. 282 (1842).

But whatever be the instantaneous effect of the death of the principal, or any other mode of dissolution, all agree it cannot terminate an agency or power coupled with an interest in the subject-matter of the agency. Whenever, therefore, the agent has an interest, ownership, special property, or lien on property in his hands belonging to his principal, and which he had been authorized to sell and discharge his claim from the proceeds, then it is clear such authority or agency is not terminated by the principal's death, even after it be known to the agent and to third parties with whom he is dealing: *Hunt* v. *Rousmanier*, 8 Wheat. 174; *Knapp* v. *Alford*, 10 Paige 201.

The assignment or transfer of property to an agent with power to sell or collect, and pay himself out of the proceeds, is a familiar illustration of a power coupled with an interest, and which is not revocable. *Walsh* v. *Whitcomb*, 2 Esp. 565; *Gaussen* v. *Morton*, 10 B. & C. 731; *Goodwin* v. *Bowden*, 54 Me. 424; *Houghtailing* v. *Marvin*, 7 Barb. 412; *Hodgson* v. *Anderson*, 3 B. & C. 842.

For this reason, a mortgagee of land, with a power of sale in the mortgage, in his own name, may make a valid sale thereof, even after the death of the mortgagor: *Varnum* v. *Meserve*, 8 Allen 158.

But in order to constitute a power coupled with an interest, it seems the agent must have some interest *in the subject-matter* of the agency, and not merely an interest in the money derived from the power, when executed, such as to pay himself out of it for his services as agent, &c. See *Blackstone* v. *Buttermore*, 53 Penn. St. 266; *Hartley's Appeal*, Id. 212; *Barr* v. *Schroeder*, 32 Cal. 609; *Houghtailing* v. *Marvin*, 7 Barb. 412.

Of course, as between principal and agent, the death of the former, *per se*, works a revocation, even without notice to the agent; and the agent has no remedy against the representative of the principal for services subsequent to his death; nor has the representative of the principal any action for the non-fulfilment of the agency: *Campanari* v. *Woodburn*, 15 C. B. 400 (1854); *Johnson* v. *Wilcox*, 25 Ind. 182 (1865). It may be they might recover of him money collected by him for the estate, or for property sold by him before the death, since assumpsit for money had and received is an equitable action: *Carringer* v. *Whittington*, 26 Mo. 311 (1858).

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

KIRTLAND *v.* HOTCHKISS.

A state is not prohibited by the Federal Constitution from taxing, in the hands of one of its resident citizens, a debt due that citizen by a resident of another state, such debt being evidenced by the bond of the debtor and the payment of the bond, secured by deed of trust of real estate, situate in the state in which the debtor resides.

IN error to the Supreme Court of Errors of Connecticut.

The plaintiff in error, a citizen of Connecticut, instituted this